VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	Criminal No. K102888
	)	
LEE BOYD MALVO, a/k/a JOHN LEE MALVO,	)	
	)	
Defendant.	)	
	)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that on the 28th day of April, 2003 at 10:00 a.m., The Washington Post Company, The Baltimore Sun Company, The Associated Press, and The New York Times Company shall present the attached Motion and request an Order granting said Motion.

Respectfully submitted,

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April 4, 2003

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	Criminal No. K102888
	)	
LEE BOYD MALVO, a/k/a JOHN LEE MALVO,	)	
	)	
Defendant.	)	
	)	

MOTION TO INTERVENE FOR THE PURPOSE OF OPPOSING DEFENDANT'S MOTION TO REQUIRE DISCOVERY DOCUMENTS AND REPORTS BE FILED UNDER SEAL

The Washington Post Company, The Baltimore Sun Company, The Associated Press, and The New York Times Company respectfully move, by undersigned counsel, to intervene in this action for the limited purpose of opposing defendant's Motion To Require Discovery Documents And Reports Be Filed Under Seal, which we understand will be heard at 10:00 a.m. on April 28, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2003, I caused copies of the foregoing Notice of Motion; Motion of The Washington Post Company, The Baltimore Sun Company, The Associated Press, and The New York Times Company to Intervene for the Limited Purpose of Opposing Defendant's Motion to Require Discovery Documents and Reports be Filed Under Seal; Memorandum of Points and Authorities in Opposition to Defendant's Motion to Require Discovery Documents and Reports be Filed Under Seal; and proposed Orders to be served by hand delivery on:

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IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	Criminal No. K102888
	)	
LEE BOYD MALVO, a/k/a JOHN LEE MALVO,	)	
	)	
Defendant.	)	
	)	

OPPOSITION TO DEFENDANT'S MOTION TO REQUIRE DISCOVERY DOCUMENTS AND REPORTS BE FILED UNDER SEAL

Intervenors The Washington Post Company, The Baltimore Sun Company, The Associated Press, and The New York Times Company respectfully submit the following Opposition to Defendant's Motion to Require Discovery Documents and Reports be Filed Under Seal in this case.

Defendant Lee Boyd Malvo, a/k/a John Lee Malvo, is charged in this Court with capital murder and using a firearm in the commission of a felony, as well as having been charged with multiple homicides in Montgomery County, Maryland and other jurisdictions. The crimes that he is charged with, along with the circumstances surrounding his alleged crimes, have made this case one of substantial public concern. The defendant's alleged crimes affected the everyday lives of citizens throughout Virginia, Maryland, and the District of Columbia for weeks.

Defendant's motion seeks to require that all documents, reports, and information provided in response to this Court's discovery orders be filed under seal.

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Because the public has a First Amendment and common law right of access to records of pretrial proceedings in criminal cases, rights that are particularly important given the high public interest in this matter, defendant's motion should be denied.

ARGUMENT

I. THE PRESS AND THE PUBLIC HAVE A FIRST AMENDMENT RIGHT OF ACCESS TO CRIMINAL PROCEEDINGS AND RECORDS IN THOSE PROCEEDINGS.

In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the United States Supreme Court, noting that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice," 448 U.S. at 573, held that the First Amendment guarantees the public and the press a right to attend criminal trials. Id. at 580. A year later, the Supreme Court of Virginia held, as a matter of state and federal constitutional law, that the public's right of access extends to pretrial proceedings, as well as the trial itself. Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 281 S.E.2d 915 (1981); see also In re Times-World Corp., 7 Va. App. 317, 373 S.E.2d 474 (1988) (trial court erred in excluding public and press from the proceedings for voir dire examination of potential jurors).

Four years later, the Supreme Court of the United States reached the same conclusion in holding that the public has a First Amendment right to attend a preliminary hearing to assess probable cause, and this right has been extended to a wide variety of pretrial proceedings. See, e.g., El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 149 (1993) (per curiam); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) ("Press-Enterprise I") (voir dire); Press-Enterprise Co. v.

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Superior Court, 478 U.S. 1, 8 (1986) ("Press-Enterprise II") (preliminary hearing). Indeed, this right of access has been extended to all manner of proceedings throughout the pretrial criminal process. In re Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984) (bail hearing); Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (pretrial proceedings and related documents); United States v. Chagra, 701 F.2d 354, 363-64 (5th Cir. 1983) (bail reduction hearing); United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982) (suppression hearing).[1]

A necessary corollary of the right of access to criminal proceedings is a right of access to documents filed in connection with such proceedings. See, e.g., In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986) ("the First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases as well as to the hearings themselves"); Associated Press, 705 F.2d at 1145 ("There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them.").

The Third Circuit in United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982), aptly summarized the underpinnings of the constitutional right of access to criminal proceedings:

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[1] See also Star Journal Publishing Corp. v. County Court, 591 P.2d 1028 (Colo. 1979) (preliminary hearing); United States v. Edwards, 430 A.2d 1321 (D.C. 1981), cert. denied, 455 U.S. 1022 (1982); State v. Williams, 459 A.2d 641 (N.J. 1983) (probable cause hearing and bail application); R.W. Page Corp. v. Trumpkin, 292 S.E.2d 815 (Ga. 1982) (pretrial and post-trial hearings); Seattle Time Co. v. Ishikawa, 640 P.2d 716 (Wash. 1982) (all pretrial proceedings).

> The Richmond Newspapers Court found open court proceedings to be mandated by at least six societal interests. First, public access to criminal proceedings promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system. See id. at 572; (plurality opinion); id. at 584; (Stevens, Jr., concurring); id. at 595-96; (Brennan, J., concurring in judgment).
>
> This public access, and the knowledge gained thereby, serve an important "educative" interest. See id. at 572 (plurality opinion). Second, public access to criminal proceedings gives "the assurance that the proceedings were conducted fairly to all concerned" and promotes the public "perception of fairness." Id. at 569, 570 (plurality opinion). Public confidence in and respect for the judicial system can be achieved only by permitting full public view of the proceedings. Id. at 595 (Brennan, J., concurring in the judgment). Third, public access to criminal proceedings has a "significant community therapeutic value" because it provides an "outlet for community concern, hostility, and emotion." Id. at 570-71 (plurality opinion). Fourth, public access to criminal proceedings serves as a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality. See id. at 569 (plurality opinion). Fifth, public access to criminal proceedings enhances the performance of all involved. See id. at 569 n.7 (plurality opinion). Finally, public access to criminal proceedings discourages perjury. See id. at 596-97 (Brennan, Jr., concurring in the judgment).

These justifications apply with full force to pretrial proceedings because

> [i]t makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases. There is a significant benefit to be gained from public observation of many aspects of a criminal proceeding . . . that may have a decisive effect upon the outcome of a prosecution.

In re Herald Co., 734 F.2d 93, 99 (2d Cir. 1984). For the same reasons, the First Amendment protects access to related "pretrial documents[, which] . . . are often

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important to a full understanding of the way in which the judicial process and the government as a whole are functioning." Associated Press, 705 F.2d at 1145 (quotation omitted).

Because the public has a First Amendment right of access, closure or sealing may be sustained only if it is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Press-Enterprise I, 464 U.S. at 510. If the interest asserted to justify sealing "is the right of the accused to a fair trial," access may be denied "only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." Press-Enterprise II, 478 U.S. at 14.

Defendant has not identified any compelling interest that justifies the relief he seeks. Rather, he makes conclusory assertions that the privacy of some person "may" be invaded, that members of the media "may" attempt to interview witnesses, and that sealing is justified to prevent the case from being "tried in the media." Motion at 1-2. None of these purported interests is sufficiently compelling to overcome the public's right under the First Amendment to access to criminal proceedings and the records of those proceedings. See Press-Enterprise II, 478 U.S. at 14 (court must make specific findings demonstrating a "substantial probability that the defendant's right to a fair trial will be prejudiced"). Indeed, they are each entirely speculative. See id. at 15 ("The First Amendment right of access cannot be

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overcome by the conclusory assertion that publicity might deprive the defendant" of a fair trial.). Moreover, defendant's request is far from narrowly tailored. To the contrary, defendant seeks to seal all documents, reports, and information provided in response to the Court's discovery orders. Such wholesale closure cannot be squared with the First Amendment. See id. at 14-15.

On the other hand, all of the considerations that mandate access to this Court's records of criminal proceedings are present here. The public interest in this proceeding is paramount, as the defendant has been accused of terrorizing our community. The proceedings before this Court implicate the public safety, the administration of our criminal justice system, and the public's desire for retribution and deterrence. Openness of the records of the proceedings in this Court serves all of the important societal interests identified by the courts – informing the public about the criminal process, assuring fairness and the perception of fairness, providing an outlet for community concern, checking corruption, and enhancing the performance of the participants. As there are no countervailing compelling interests that justify the sealing of records that defendant seeks, defendant's motion should be denied.

II. THE PRESS AND THE PUBLIC HAVE A COMMON LAW RIGHT OF ACCESS TO JUDICIAL RECORDS.

The press and the public also have a common law right of access to judicial records. See, e.g., Nixon v. Warner Communs., Inc., 435 U.S. 589, 597 (1978); Stone v. University of Md. Medical Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988) ("The common law presumes a right to inspect and copy judicial records and

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documents."); In re NBC, 653 F.2d 609, 612 (D.C. Cir. 1981) ("the existence of the common law right to inspect and copy judicial records is indisputable"). This common law right of access provides an independent basis for denying defendant's motion.

"[T]he decision whether a document must be disclosed pursuant to the common law right of access involves a two-step inquiry. First, the court must decide 'whether the document sought is a public record.' If the answer is yes, then the court should proceed to balance the government's interest in keeping the document secret against the public's interest in disclosure.'" Washington Legal Found. v. United States Sentencing Comm'n, 89 F.3d 897, 902 (D.C. Cir. 1996) (quoting Washington Legal Found. v. United States Sentencing Comm'n, 17 F.3d 1446, 1451-52 (D.C. Cir. 1994)).

The first step of this inquiry is satisfied here. The documents that Defendant seeks to seal – materials filed in the Court's official file – are plainly public records. In addition, as discussed above, the second step is satisfied as well, since the public has a significant interest in disclosure of documents that shape the conduct of pretrial hearings in criminal cases. This interest is overwhelmingly present in this case. Moreover, there is no countervailing interest in making the documents secret that can overcome the enormous public interest in disclosure. Accordingly, for this additional, independent reason, defendant's motion should be denied.

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CONCLUSION

For the foregoing reasons, defendant's Motion to Require Discovery Documents and Reports be Filed Under Seal should be denied.

Respectfully submitted,

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Dated: April 4, 2003

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